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United Nations Commission on International Trade Law Thirty-fifth session

Summary record of the 740th meeting

Held at Headquarters, New York, on Monday, 17 June 2002, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) (Mexico)

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Finalization and adoption of the draft UNCITRAL Model Law on International
Commercial Conciliation (*continued*)

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In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 3.10 p.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514)

1. **The Chairman** invited the Committee to resume consideration of the draft UNCITRAL Model Law on International Commercial Conciliation in the version contained in the annex to the report of the Working Group on Arbitration on the work of its thirty-fifth session in Vienna from 19 to 30 November 2001 (A/CN.9/506).

Draft article 2. Interpretation

2. **The Chairman** noted that the text of draft article 2 on interpretation had been inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods and that similar wording appeared in other UNCITRAL model laws.

3. **Mr. Graham** (Mexico) said his delegation wished to emphasize the importance of adopting the text of the draft article as it stood in order to ensure uniformity in the interpretation of the Model Law in various countries.

4. **Mr. Morán Bovio** (Spain) said he agreed with Mexico that the draft article set forth a very important principle that was in keeping with the Commission's other work.

5. *Draft article 2 was provisionally approved.*

Draft article 3. Variation by agreement

6. **Mr. Inoue** (Japan) said that his delegation wished to see draft article 3 on variation by agreement adopted in its current form and could not concur with the proposal made by France (A/CN.9/513) to include a mention of draft article 15, "Enforceability of settlement agreement", among the provisions of the Law which parties could not vary by agreement. Since conciliation depended heavily on the principle of party autonomy, parties should not be deprived of the freedom to accord their settlement a weaker effect than that of a contract or an arbitral award.

7. **Mr. Jacquet** (France), referring to France's written comments on draft articles 3 and 15 (A/CN.9/513), said that his delegation did not see the value of allowing the parties to determine the level of enforceability of their settlement agreement, particularly since in most countries that would run counter to the tendency of national law. Therefore, it was appropriate to mention article 15, whatever its final form might be, as one of the provisions the parties could not derogate from.

8. **The Chairman** suggested to the delegations that had submitted the comments that appeared in A/CN.9/513 and Add. 1 and 2 that they should repeat their arguments orally if they wanted them to be considered in the present debate.

9. **Mr. Markus** (Observer for Switzerland) said that he did understand the French position, since enforcement necessarily involved the mechanisms of the State. Parties could not agree on a greater degree of enforceability of their settlement than the laws of the State permitted. However, it was possible that parties might wish to agree on a lesser degree of enforceability, or conceivably even none. Therefore his delegation did not think that article 15 should be mentioned in draft article 3 as a mandatory exception to variation by agreement. Instead, in the Guide to Enactment it could be explained that the parties could not agree on a higher level of enforcement than that provided by article 15 and by national law, but could agree on a lower level of enforceability.

10. **The Chairman** said that, without wishing to cut off debate, he might suggest that it would be better to discuss France's proposal once the content of draft article 15 had been decided.

11. **Mr. Tang Houzhi** (China) said that without a strong provision on enforceability, the Model Law would lose much of its significance. The parties should not be allowed to agree to reduce or exclude the enforceability of their settlement agreement.

12. **Mr. Kovar** (United States of America) said that his delegation shared Japan's view that party autonomy was at the core of the Model Law. As the Observer for Switzerland had said, it was hard to see why parties could not settle for less than full enforceability. His delegation favoured omitting mention of draft article 15 from draft article 3, but agreed with the Chairman that it would be better to finalize draft article 15 first, and article 7, paragraph (3) as well, before making a

final decision on which articles to mention in draft article 3.

Draft article 4. Commencement of conciliation proceedings

Draft article 5. Number of conciliators

13. **Mr. Tang Houzhi** (China) said that his delegation had no problems with the wording of draft article 4 on commencement of conciliation proceedings, but felt strongly that footnote 3 to the draft article, containing the so-called "article X" on suspension of the limitation period, should be included in the body of the draft articles. Without a suspension of the limitation period during conciliation proceedings, parties might be far more reluctant to resort to conciliation.

14. **The Chairman** said that the decision to put that material in a footnote had been one of the hardest compromises for the Working Group to reach.

15. **Mr. Inoue** (Japan) said that the wording of draft article 4, paragraph (1), stating that conciliation proceedings commenced "on the day on which the parties to the dispute agree to engage in conciliation proceedings", was unclear, because parties might agree in principle to conciliate even before a particular dispute arose. The two cases needed to be distinguished.

16. With regard to draft footnote 3, which indicated that the text of article X was suggested for States that might wish to adopt a provision on the suspension of the limitation period, the word "suggested" was too strong. A more neutral term should be found.

17. **The Chairman** explained that, in respect of draft article 4, the Working Group had been concerned with an agreement to engage in conciliation proceedings after a dispute had arisen, not a general agreement to conciliate, which might have been entered into prior to a dispute.

18. **Mr. García Feraud** (Observer for Ecuador) said that his delegation did not wish to re-open the entire debate, but simply to recall that Ecuador, in its written comments (A/CN.9/513), had argued for the inclusion of draft article X in the main body of the Model Law, rather than as an optional clause. In Ecuador itself, the option would probably be adopted as the norm. The concern was that in some countries, if no particular provision was made for suspension of limitation, the

commencement of conciliation might bring about an interruption of the limitation period, which, if conciliation was unsuccessful, would begin to run again from day one.

19. **Mr. Jacquet** (France) said that his delegation saw difficulties with article 4, paragraph (2), according to which a party could assume that its invitation to conciliate was rejected if it received no answer within 30 days. If the parties had no prior conciliation agreement, and one party invited the other to conciliate after a dispute had arisen, the clause raised no problems. If, however, the parties did, for example, have a conciliation clause in their contract, and one party invited the other to conciliate, the second party would have to accept or be in breach of contract. His concern was that the paragraph might be interpreted as providing that party a loophole to escape its contractual obligation. Accordingly, he proposed that the sentence should be preceded by the words, "In the event that the parties have not concluded a conciliation agreement, ...".

20. **The Chairman** said that, as the Working Group understood it, the provisions of paragraph (2) would apply whether or not there was a prior conciliation agreement. In either case, after 30 days the first party could consider the invitation to conciliate rejected. Only the consequences of that rejection would differ, and they were outside the scope of the Model Law.

21. **Mr. Holtzmann** (United States of America) said draft article 4, paragraph (2), placed in question the obligation of a party which stated its agreement to conciliate and then failed to do so. It must be recognized that even if one party agreed to conciliate, any attempt to enforce the agreement would be subject to draft article 12 (d), which would allow the other party simply to terminate the proceedings by resorting to the voluntary concept which lay at the heart of conciliation. Draft article 4, paragraph (2), reflected that fact. It was also consistent with current practice, because according to article 2 of the UNCITRAL Conciliation Rules, conciliation began when one party issued an invitation and the other accepted it. His delegation therefore had no difficulty with paragraph (2).

22. Referring to the statement by the representative of Japan, he said that draft article 4, paragraph (1), if read literally, could be taken to mean that conciliation would begin on the date of the original contract,

however long ago that was, if the contract contained a conciliation clause. However, a commonsense reading of that paragraph, and his own, was that it referred to the date on which the dispute arose and the parties agreed to conciliate. He therefore agreed with the Secretary that draft article 4, paragraph (1), warranted some redrafting.

23. Concerning the additional draft article X, he had no objection to including a provision to allow States to opt for suspending the limitation period, but the addition seemed to be in the wrong place. There were certain risks attached to the provision, and States should be made fully aware of them. Because conciliation was by definition informal and flexible, it was difficult to define what a conciliation procedure was, and when it began and ended.

24. The Working Group had correctly taken the approach that conciliation might be pursued in a variety of ways. A State which adopted a provision along the lines of draft article X must be aware of the need for precision about the beginning and end of the conciliation procedure, because if a dispute arose towards the end of the prescription period, the decision whether conciliation had begun or ended might determine the outcome of the dispute, one party maintaining that the claim remained alive, the other that it was dead. The resulting uncertainty would engender litigation, and in turn litigation would undermine the reputation of the conciliation process.

25. The parties themselves would have no need of draft article X: a party aware that the prescription period was about to expire would be free to initiate an arbitration procedure, or proceedings in a national court, to protect its rights. States, however, should be advised of the practical effect of adopting the provision, in case their legislatures did not realize it. He suggested that could best be done by moving draft article X to the Guide.

26. **The Chairman** said the decision to place draft article X as a footnote had been a compromise solution devised by the Working Group; some delegations had been anxious to include it in the body of the text.

27. **Mr. Marsh** (United Kingdom) agreed with the representative of the United States about the need for clarity in defining the commencement of the conciliation proceedings. It was not just a matter of determining when a suspension of the limitation period began, but also of the admissibility of evidence. Draft

article 11, paragraph (1) (c), referred to statements or admissions made by a party "in the course of the conciliation proceedings", which he took to be a reference back to draft article 4, paragraph (1). Both provisions had to be clarified. He was concerned to know when the parties could be said to "agree" to conciliate, according to draft article 4, paragraph (1). In United Kingdom practice it would be difficult to pin down a date, because the initial agreement would be informal and merely a matter of principle, the details being fleshed out later. Would the agreement take shape at the initial stage, or when the details were decided upon?

28. **Mr. Sekolec** (Secretary of the Commission) said the earlier versions of draft article 4, paragraph (1), had contained more detail on the timing of the agreement. However, the Working Group had decided it was prudent not to attempt a definition. A unified rule on the timing would not be achievable, because of the variety of solutions in national law in matters of contract. For that very reason, the Convention on Contracts for the International Sale of Goods did not include such a definition.

29. As for draft article 4, paragraph (2), he suggested that a text could be incorporated into the Guide to clarify the kind of situation which might arise if there was a pre-existing conciliation agreement and one of the parties failed to respond to an invitation to conciliate. Draft article 4, paragraph (2), stated that silence could be treated as a rejection of the invitation, but did not define the consequences of the rejection. Depending on the national law in question and the nature of the conciliation agreement, they might include loss of goodwill and liability for damages or even for court costs, if the result was litigation. The consequences of a rejection could even be referred to in the text of the article.

30. **Mr. Möller** (Observer for Finland) thought it would be inadvisable to define in draft article 4, paragraph (1), exactly when the agreement to conciliate was reached. He could accept both paragraphs of draft article 4 as they were; there was no need for the additional language for paragraph (2) suggested by the delegation of France, provided sufficient clarification was given in the Guide. As for draft article X, he was not in favour of placing it in the body of the text. Introducing complex arrangements for suspending the limitation period would make the Model Law less attractive to Governments.

31. **Mr. Inoue (Japan)** said draft article 4 dealt only with the point in time at which conciliation proceedings began. Because the commencement had legal consequences, it was also necessary to have a procedure for termination, as provided in draft article 12. He was interested in the suggestion by the delegation of France that a distinction could be drawn between contracts containing a conciliation clause and others which did not. The commencement of conciliation proceedings could be defined as the point in time when one party invited the other to conciliate, on the basis of a prior agreement. The other party would then be required to have recourse to draft article 12 in order to terminate the proceedings.

32. **Mr. Zanker (Observer for Australia)** said that if paragraph (1) was ambiguous, it should be reviewed by the drafting group. He interpreted it to refer to agreements made in the context of particular disputes, not those incorporated in a prior contract. The arrangements for terminating proceedings were spelled out in draft article 12. If no other circumstances were envisaged than those in draft article 12, they could perhaps be covered in draft article 10.

33. It was difficult to define the timing of conciliation proceedings without being overly prescriptive. The prospect of litigation in which the duration of the limitation period was itself in dispute would not make the Model Law any more attractive to States. He was not in favour of including draft article X in the body of the text.

34. **Ms. Manglayankul (Thailand)**, commenting on draft article X, agreed with the representative of the United States. The appeal of conciliation lay in its flexibility and the fact that it was voluntary. Including a provision such as draft article X in the text of the Model Law would confer on the procedure something of a compulsory character, and create other difficulties for jurisdictions such as hers in which the limitation period was already defined in civil and commercial law. It would also have an impact on contractual relations. If a majority in the Commission wished to include draft article X, she would prefer to place it in the Guide rather than as a footnote. If that was done, she would have no difficulty with either paragraph of draft article 4.

35. **Mr. García Feraud (Observer for Ecuador)** said his country was anxious to see the draft Model Law completed as soon as possible. The explanation given

by the acting Chairman made clear that the placing of draft article X had been a compromise solution. In any case, the essence of the draft Model Law was that conciliation was voluntary, so an optional provision for suspending the limitation period, not included in the body of the text, would be appropriate. There might indeed be a risk of parties exploiting it by seeking to prolong proceedings, or accepting an offer to conciliate but failing to proceed; however, it was no less risky to have no provision along the lines of draft article X.

The meeting was suspended at 4.35 p.m. and resumed at 5.15 p.m.

36. **The Chairman** said that, following consultations with various delegations, a consensus had emerged to retain the Working Group's proposal to include draft article X in a footnote as a suggested option, and to provide guidance to States on making their decision in the corresponding section of the Guide to Enactment. Any remaining doubts concerning the interpretation of draft article 4 should also be clarified in the Guide.

37. **Mr. Tang Houzhi (China)** said that even though his delegation could accept the current formulation of draft article 4, the Model Law would have been more attractive to States if draft article X had been included in the main text. There were objective reasons for its inclusion, and it had nothing to do with compatibility with Chinese law. The purpose of determining the commencement and termination of conciliation proceedings (in draft articles 4 and 12, respectively), was to indicate clearly the basis for suspending the limitation period. Without the inclusion of draft article X, the purpose of the provisions of draft articles 4 and 12 was unclear.

38. **The Chairman** explained that discussions would continue in the drafting group with a view to improving the notes in the Guide on the advantages and disadvantages of adopting draft article X.

39. *Draft articles 4 and 5 were provisionally approved.*

Draft article 6. Appointment of conciliators

40. **Mr. Marsh (United Kingdom)** said that the wording of article 6, paragraph (2), assumed that there were only two parties to the dispute, which would prevent it from being applied to disputes involving several parties. The drafting group should consider how to resolve that problem.

41. **Mr. Sekolec** (Secretary of the Commission) said that since the same problem arose in other paragraphs, the point made by the representative of the United Kingdom seemed to be more than a simple drafting question. There would need to be a comprehensive solution, either by including a catch-all provision for disputes involving more than two parties, or by redrafting each article where the problem arose.

42. **Mr. Morán Bovio** (Spain) said that situations in which there were more than two parties to a dispute were quite common, for instance when disputes arose between more than one provider of the same product and a manufacturer over the price of goods or sequencing of delivery. He suggested the insertion of a catch-all provision at the end of the main text, such as "whenever the text refers to two parties, it could equally apply to several parties". That amendment would not entail extensive changes to the text.

43. **Mr. Sekolec** (Secretary of the Commission) said that draft article 6 did not concern the number of parties, but the number of conciliators. Paragraphs (1), (2) and (3) should be seen as neutral as to whether the dispute involved two or several parties. The drafting group should endeavour to find a way to express the idea that paragraph (2), for instance, concerned the appointment of two conciliators, either by two or by several parties.

44. **Mr. Zanker** (Observer for Australia) agreed that the point raised by the representative of the United Kingdom was more than just a drafting question. The focus of draft article 6 should be on the rights of the parties. He acknowledged that paragraph 1 was neutral, but in cases involving more than one conciliator, the provisions should focus on what the parties wanted, rather than on the number of conciliators. It should be considered whether a maximum limit of three conciliators should be established for cases involving a panel.

45. **Mr. Tang Houzhi** (China) said that draft articles 5 and 6 presented no difficulties for his delegation. The provisions of draft article 5 did not conflict with those of draft article 6, paragraph (3), pursuant to which each party should appoint one conciliator in cases for which the composition of a panel was requested. However, if there were three parties to a conflict, one of which appointed a conciliator and two agreed to appoint one conciliator between them, the provisions of paragraph (3) would not apply. While his country had no experience of such cases in the area of conciliation, there were arbitration cases in which several parties constituted either the claimant or the

respondent. In those circumstances, the claimant and the respondent, respectively, were each entitled to appoint a single arbitrator.

46. **Mr. Sekolec** (Secretary of the Commission) said that one of the principles on which article 4 of the UNCITRAL Conciliation Rules was based was that the appointment of conciliators depended entirely on the parties to a dispute. The same philosophy was reflected in article 6 of the draft Model Law. The problem presented by paragraphs (2) and (3) of that article with regard to cases involving more than two parties could be resolved by providing for the parties to "endeavour to reach agreement on the number of conciliators and the manner of appointing them".

47. **The Chairman** proposed that the solution suggested by the Secretary of the Commission should be approved. If the parties failed even to agree on the number of conciliators and the manner of appointing them, there could be no conciliation at all.

48. **Mr. Getty** (United States of America) said, with regard to draft article 6, paragraph (6), that while his delegation would have preferred a reference to "conflict of interest", it did not see a need to amend the current text. Nevertheless, it remained concerned that the application of remedies could be hindered by the provisions of the article. If a conciliator failed to disclose a conflict of interest, with the exception of obviously intentional fraud, the corresponding settlement agreement should still be allowed to take effect. Sometimes, parties deliberately chose a conciliator with particular expertise in a given area, meaning that he or she could not be totally impartial. That issue could be explained in the Guide to Enactment.

49. **The Chairman** expressed concern with the suggestion made by the representative of the United States of America, a discussion of which had already been held in the Working Group. However, an explanation in the Guide that the failure to disclose a conflict of interest should not itself annul the conciliation result would not carry sufficient weight in some legal systems. In Mexico, for instance, a judge could still decide to annul a settlement under such circumstances. Members should give serious thought to the matter before the next meeting.

The meeting rose at 6 p.m.

**A/CN.9/
SR.741**



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United Nations Commission on International Trade Law Thirty-fifth session

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Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) (Mexico)

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In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 10.15 a.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (continued) (A/CN.9/506; A/CN.9/513 and Add.1-2 and A/CN.9/514)

Draft article 6. Appointment of conciliators (continued)

1. **The Chairman** invited the Secretary to read the suggested revisions to article 6 that the drafting group had been requested to prepare in order to cover the possibility of multi-party conciliation.

2. **Mr. Sekolec** (Secretary of the Commission) said that the drafting group had prepared two alternative formulations for the Commission's consideration, each with two variants.

3. The first alternative involved retaining the original paragraph (1) and replacing paragraphs (2) and (3) with the following text:

"In conciliation proceedings with two or more conciliators, the parties shall endeavour to reach agreement on either a joint appointment of the conciliators or on [first variant: the procedure for the appointment of the conciliators] / [second variant: the way in which the parties will appoint the conciliators]."

4. The second alternative involved replacing all three paragraphs with the following new paragraph:

"The parties shall endeavour to reach agreement on either a joint appointment of the conciliator or conciliators or on: [first variant: the procedure for the appointment of the conciliator or conciliators] / [second variant: the way in which the parties will appoint the conciliator or conciliators]."

5. **Mr. Morán Bovio** (Spain) expressed support for the first alternative and first variant, which appeared to reflect the concerns raised by the representative of the United Kingdom at the previous meeting. The second variant was too vague.

6. **Mr. Holtzmann** (United States of America) joined with the previous speaker in expressing support for the first alternative, which — on first reading — appeared to allow greater flexibility. The reference to "two or more conciliators" was particularly welcome, since the assumption was all too often made that there should always be an odd number of conciliators. The word "joint" should, however, be deleted, since it gave the impression that mutual agreement was necessary for the appointment of each conciliator. Each party might instead prefer to appoint its own conciliator, regardless of the other party's approval. His delegation could not support the second alternative since it did not allow for the possibility of two conciliators, and since use of the plural form ("the parties") implied that joint agreement was necessary.

7. **Mr. Marsh** (United Kingdom), also giving his preliminary reaction to the suggested revisions, said that the first alternative seemed most acceptable. It was his delegation's view, however, that the language in the new paragraph (2) should be brought in line with paragraph (1) to refer in each case to agreement on the name of the conciliator or conciliators, not merely to their appointment.

8. **Mr. Tang Houzhi** (China) said that he was also more in favour of the first alternative and first variant. However, it was not clear from the proposed text whether there would always be one conciliator for each party, regardless of the number of parties. In paragraph (5), the words "or third conciliator" should be deleted since there was no such concept.

9. **Mr. Markus** (Observer for Switzerland) joined fully with the representatives of Spain and the United States of America. In the draft guide, the very sound procedure described in the current paragraph (2) could be mentioned as one important method for settling disputes.

10. **Mr. Mirzaee-Yengejeh** (Islamic Republic of Iran) said that his delegation also favoured the first alternative and first variation, which offered greater flexibility. It also supported deletion of the word "joint" and the revision proposed by the representative of the United Kingdom.

11. **Mr. García Feraud** (Observer for Ecuador) expressed strong support for the first alternative and first variant, which covered many situations not dealt with in previous texts. He also favoured deletion of the word "joint". In addition, it should be made clear that

an agreement between the parties could be constituted by more than one document, whether simultaneously or successively submitted. Deletion of paragraph (1) might also be considered.

12. **Mr. Möller** (Observer for Finland), welcoming the first alternative and first variant, said that he could also fully support deletion of the word "joint" and the suggestion made by the Observer for Switzerland. He was not, however, convinced by the need to bring the language in the new paragraph (2) in line with paragraph (1) as proposed by the representative of the United Kingdom. The matter should be left to the drafting group.

13. **Mr. Zanker** (Observer for Australia) said that the concern raised by the representative of the United Kingdom might best be met by modifying paragraph (1) — replacing the word "name" with the words "procedure for appointment" — and reformulating the first proposed alternative, first variant thus: "In conciliation proceedings, the parties shall endeavour to reach agreement on the procedure for appointment of the conciliator or conciliators".

14. **Mr. Meena** (India) said that his delegation supported the first alternative, first variant, and deletion of the word "joint".

15. **Mr. Graham** (Mexico) said that his delegation was also prepared to support that alternative and variant, and would not object to deletion of the word "joint". It fully supported deletion of paragraph (3), which applied more to arbitration.

16. **Mr. Jacquet** (France) said that it would be reasonable either to retain paragraph (2) or to modify it so that it would apply to instances in which there were two or more conciliators and more than two parties involved in a dispute. The text of paragraph (2) applied to a situation which frequently occurred and would therefore prove useful.

17. France supported the Secretary's proposal and agreed with the United States view that the word "joint" should be deleted to avoid an excessively restrictive provision. If necessary the text could be slightly modified to include cases in which the parties themselves appointed conciliators, or in the event that a third conciliator were to be appointed. The current text gave the impression that there were two situations which were mutually exclusive: that either the parties would come to an agreement on the appointment of

conciliators, or that the parties would agree on a procedure for the appointment of conciliators. In his opinion, both possibilities were viable.

18. **Mr. Slate** (Observer for the American Arbitration Association) said that he supported the version of paragraph (2) as presented by the Secretary, and believed that the word "joint" should be deleted.

19. **Mr. Morán Bovio** (Spain) said that his delegation supported the proposal made by the Observer for Australia on paragraph (1), and that, in an attempt to accommodate the United Kingdom proposal, it might be necessary to study the content of paragraphs (1) and (3) in terms of their similarities. His delegation was still weighing the advantages and disadvantages of keeping paragraph (2). He believed that the representative of France might be correct in his arguments in favour of retaining paragraph (2). It was also necessary to consider the issue of multi-party conciliation, as raised by the United Kingdom, taking into consideration the diversity and varying expertise of conciliators.

20. **Mr. Sillapamahabundit** (Thailand) said that his delegation wished to join the majority view in support of the first alternative; it also favoured the inclusion of provisions applying to instances involving two or more conciliators, as presented in the draft Guide to Enactment.

21. **Mr. Zanker** (Observer for Australia) said that he wondered whether the concerns expressed by Finland, France, Spain and Switzerland with regard to paragraph (2) could not be addressed by a statement, within the text, that Parties had the entitlement, but were not bound, to nominate a conciliator. In the case of multi-party conciliation it was conceivable that a number of parties with a common interest might be served by a single conciliator acting on their behalf. Similarly, there might be cases when each party might prefer having its own conciliator.

22. **Mr. Barsy** (Sudan) said that the Secretary's proposed first alternative adequately covered paragraphs (2) and (3). His delegation supported the deletion of the word "joint", and suggested that it would be fitting to add the following modification to the proposal made by the Secretary: "... the parties shall endeavour to reach an agreement either on a joint appointment of a conciliator or conciliators, or on the procedure of (sic) the appointment of one conciliator or conciliators." That alternative would cover agreement

on proceedings envisaged under paragraph (1). With regard to the concerns expressed by the United States, he believed that paragraph (5) was clear and adequately covered the situation in question.

23. **Mr. Shimizu** (Japan) said his delegation was flexible, but agreed with the view that the new proposals might imply a change in policy. Draft article 6 was intended to apply as a default rule in cases where parties could not reach agreement. He believed it might be wise to make a decision on policy before continuing the drafting exercise.

24. **Mr. Sekolec** (Secretary of the Commission) said that the scenario in which each party appointed its own conciliator or conciliators was not comparable to the situation existing in arbitration where a party had an independent right to appoint its own conciliator. It must be implied that such a conciliator had to be approved and accepted by the other party. That approximated the situation wherein both parties accepted both conciliators, even though the procedure for such appointment was that each party would individually appoint its own. Therefore, the distinction between the joint appointment of two conciliators and the case where each party appointed a conciliator was not very clear.

25. Paragraph (2) had earlier been criticized on the grounds that it allowed one party to impose its choice of conciliator on another party, but that was not actually the case.

26. **The Chairman** said it was clear from the discussion that there was much support for the first alternative proposed by the Secretary of the Commission. Within that alternative, there seemed to be a preference for the first variant. It was also clear that the word "joint" should be deleted.

27. He believed it might be timely to suspend the meeting in order for consultations to be held on new wording that would encompass the points made on various aspects of draft article 6.

The meeting was suspended at 11.25 a.m. and resumed at 12.25 p.m.

28. **The Chairman** announced that the Commission had adopted the first alternative and the wording of the first variant proposed by the Secretary. The word "joint" would be deleted and the drafting group would have to amalgamate draft paragraphs (1) and (2). Concerns about conciliation proceedings with two or

more conciliators would be dealt with in the draft Guide to Enactment. The drafting group would submit a text to the Commission by the next day.

29. **The Chairman** drew attention, with regard to paragraph (6), to the United States view that failure to disclose circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence should not systematically result in the nullification of a settlement agreement.

30. **Mr. Marsh** (United Kingdom) said that the paragraph should specify that a conciliator could not be held responsible for circumstances of which he or she was unaware.

31. **Mr. Jacquet** (France) opposed making any changes to the text of paragraph (6) and disagreed with the United States proposal to eliminate consequences where a conciliator had no knowledge of a circumstance that should have been disclosed. For one thing, discussion of consequences in the draft Guide to Enactment was pointless when the Model Law made no reference to them. Moreover, failure to fulfil an obligation should entail consequences whether or not that was explicitly stated in the text. Excessive leniency could be frowned upon in legal circles, where the Model Law was likely to be widely disseminated. In short, he hoped that the United States proposal would not be adopted.

32. **Mr. Möller** (Observer for Finland) supported the remarks made by the representative of France. He was also reluctant to accept the United Kingdom proposal, since it would require altering a formulation taken from the UNCITRAL Model Law on International Commercial Arbitration, and, in any case it was self-evident that a conciliator could not be held liable for a situation of which he himself was unaware.

33. **Mr. Getty** (United States of America) said that there had been a misunderstanding. The issue was not whether or not there should be consequences for failure to fulfil an obligation, which was a matter of ethics, but rather whether or not the articulation of a specific ground could be interpreted as a basis for nullifying a settlement agreement that would not otherwise be nullified under normal contract law. His delegation believed that conciliators were legally and ethically obligated to disclose any circumstance that compromised their impartiality or independence; however, they should not be held liable for inadvertent technical failures to do so.

34. **Mr. Sekolec** (Secretary of the Commission) said that the Working Group had decided to incorporate the United States view by indicating in the draft Guide that paragraph (6) was not intended to add a new ground for the setting aside of a settlement agreement beyond those already contained in a State's domestic contract law. The Working Group had deliberately refrained from attempting to make any changes or additions to existing contract law, since disclosure could have a different effect under the contract law of different legal systems.

35. **Mr. Morán Bovio** (Spain) supported the Secretary's proposal to retain the paragraph as drafted and provide an explanation in the draft Guide to Enactment, which would allay the concerns expressed by the United States, French and Finnish delegations and also take the United Kingdom proposal into account.

36. **The Chairman** said that no changes would be made to the text of paragraph (6) but that an explanation would be provided in the draft Guide to Enactment.

37. *It was so decided.*

Draft article 7. Conduct of conciliation

38. *Paragraphs (1) and (2) of draft article 7 were provisionally approved.*

39. **Mr. Getty** (United States of America), referring to draft paragraph (3), said that his delegation and others were of the view that the paragraph raised the possibility of the conciliation being set aside. The unanimous sentiment in the dispute resolution section of the American Bar Association had been that the paragraph could have dangerous consequences if misunderstood. Although the Commission had decided in Vienna that paragraph (3) would refer to the conduct of the proceeding only, it could have a broader interpretation in the United States of America and other countries, where a subsequent determination that the settlement agreement was unfair could imply that the conduct of the proceeding had also been unfair and thereby constitute grounds to set aside the conciliation. Thus, it would be better if the issue were decided by the contract law of the local jurisdiction.

40. His delegation preferred to see the paragraph deleted in its entirety or, if that was not acceptable to the Commission, at least to have the mandatory

provisions of the paragraph removed to allow for a more flexible interpretation by agreement of the parties. The opening phrase "In any case" should also be deleted and there should be a clear statement in the draft Guide to Enactment that paragraph (3) did not seek to create a new cause of action to challenge the conciliation, that any challenge would be made in accordance with existing contract law and that the conduct, not the result, of the proceedings must be fair (since the result would almost always be subjective in the eyes of the parties).

41. **The Chairman** asked for reactions to the argument put forward by the delegation of the United States.

42. **Mr. Jacquet** (France) said that draft article 7, paragraph (3), like the other articles of the draft Model Law, had been discussed at great length by the Working Group. His delegation was disappointed that paragraph (3) had already marked a dilution of the obligation to maintain fairness expressed by the equivalent provisions in the UNCITRAL Model Law on International Commercial Arbitration, but nevertheless supported the inclusion of the paragraph as a fundamental component of the present draft Model Law from which no derogation should be possible. It could see no use in an agreement that allowed conciliators to forego being even-handed.

43. Again, it opposed with regret the suggestion made by the delegation of the United States that the phrase "in any case" at the beginning of paragraph (3) should be deleted, on the grounds that it followed on from the previous paragraph, which emphasized the number of ways in which conciliation could be conducted. The effect of "in any case" was to stress that whatever the variety of methods available, the method selected had to be governed by the principle of fairness.

44. **Ms. Renfors** (Sweden) echoed the view of the delegation of France: she understood the concerns of the United States delegation, but did not wish to see paragraph (3) deleted. She interpreted that paragraph's provisions as referring not to the conduct of the conciliation procedure, but to its result, and with that interpretation it would also not be advisable to delete the reference to draft article 7, paragraph (3), in draft article 3, as that would leave the parties free to agree to a derogation. It was important for the draft Model Law to include a provision referring to fair conduct of the

conciliation, particularly if the forthcoming discussion of draft article 15 resulted in the conciliation procedure being made enforceable in some way. She had no objection to the United States proposal to delete the phrase "in any case" at the beginning of paragraph (3), though she did not see clearly how that could help to address that delegation's objections.

45. **Mr. Möller** (Observer for Finland) echoed the views of the delegations of France and Sweden, considering that paragraph (3) was a necessary component of the draft Model Law and that it applied to the conduct, not the result, of the conciliation procedure. Moreover, deleting the phrase "in any case" was counterproductive: he could not see why the parties should be able to agree that the conciliator should not be bound to maintain fair treatment or take account of the circumstances of the case. He favoured an amendment to meet the concerns of the United States delegation if necessary, but not outright deletion.

46. **Mr. Tang Houzhi** (China) echoed the views of the delegations which had not favoured the proposal of the United States delegation. Firstly, paragraph (3) enshrined a fundamental principle for conciliators. Secondly, when a court came to interpret article 15 of the Model Law, it would not be able to intervene in conciliation procedures in the same way in which it could intervene in arbitration procedures. In the case of arbitration, a court could decide if there had been any shortcomings in a procedure, and could set aside an arbitration award as a result. In the case of conciliation, there was no such option for a court to set aside a settlement. Arbitration decisions were made by an arbitrator, while conciliation decisions were made not by a conciliator, but by the parties themselves. In the light of the fact that the present draft Model Law did not have court-related provisions comparable to those of the Model Law on International Commercial Arbitration, paragraph (3) was entirely necessary and appropriate.

47. **Mr. Morán Bovio** (Spain) said that the issue raised by the United States delegation was one which had long been a focus of attention for the Working Group on Arbitration, as demonstrated by paragraphs 70 to 74 of the report on the work of its thirty-fifth session (A/CN.9/506), held in Vienna in November 2001. The wording of the draft Model Law had been the result of a consensus at that session. That history to the matter showed that it was probably one of the most sensitive in the draft Model Law. On the one hand, the

need for conciliators to be fair with the parties had to be emphasized. On the other hand, as the United States delegation had pointed out, including that call for fairness in the draft Model Law left it open to challenge on the grounds that a conciliation procedure might not have been fair. The significance of the issue was further highlighted by draft article 3 of the Model Law, which prevented the parties from agreeing to derogate from that principle of fairness, and the ban on derogation was itself proof that fair treatment was regarded as a cornerstone of conciliation.

48. The principle of fair treatment could even be considered a non-negotiable part of the draft Model Law, as diluting it could jeopardize its future success and acceptance by legal and judicial authorities. While his delegation was strongly in favour of retaining draft article 7, paragraph (3), for all the reasons he had explained, the concerns voiced by the United States delegation over the practical application of that paragraph might be met by making it clear, in the body of that paragraph, that fair treatment was required "during the course of the conciliation procedure". Although when read in its entirety, paragraph by paragraph, draft article 7 implied that understanding in any case, more explicit wording might be advisable. That might prevent a situation in which a settlement agreement reached by conciliation was challenged because, for example, notification arrangements were not the same for all the parties involved in the procedure.

49. **Mr. Getty** (United States of America) thanked the Commission for its discussion of an issue which the United States delegation had felt obliged to raise because it was causing a problem. That problem had arisen from a misunderstanding of the Working Group's original intention: that the requirement for fairness pertained to the conduct of the conciliation, and not to its result, whose fairness would always be open to debate. The United States delegation would be happy with a clear statement in the draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation that the requirement applied to the conciliation procedure, not to the settlement agreement resulting from that procedure, and that it did not vary from existing jurisdictional contract law.

50. **The Chairman**, in the absence of any objections, summarized the outcome of the debate as follows: Draft article 7, paragraph (3) would be left unchanged,

as would the reference to it in draft article 3. However, the draft Guide would indicate clearly that article 7, paragraph (3) did not refer to the settlement agreement. That was logical, as the conciliator had no control over what the parties agreed between themselves. In addition, it would be made clear that, the simple fact of the conciliator failing to comply with the obligations placed on him by article 7, paragraph (3), would not provide new and independent grounds, over and above those of existing contract law, to set aside a settlement agreement.

51. *It was so decided.*

Election of officers (continued)

52. **Mr. Cachapuz de Medeiros** (Brazil), speaking on behalf of the Group of Latin American and Caribbean States nominated Mr. Guillermo Reyes (Colombia) for the office of Vice-Chairman.

53. *Mr. Reyes (Colombia) was elected Vice-Chairman by acclamation.*

54. **Mr. Mirzaee-Yengejeh** (Islamic Republic of Iran), speaking on behalf of the Group of Asian States, nominated Ms. Vilawan Mangklatanakul (Thailand) for the office of Vice-Chairman.

55. *Ms. Mangklatanakul (Thailand) was elected Vice-Chairman by acclamation.*

The meeting rose at 1 p.m.